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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. TYSHAUN JACKSON et al., Defendants and Appellants.	B256011 (Los Angeles County Super. Ct. Nos. VA110848, VA120231)

APPEAL from judgments of the Superior Court of Los Angeles County, Michael L. Schuur, Temporary Judge (pursuant to Cal. Const. art. VI, § 21); Margaret M. Bernal, Leland H. Tipton, Dewey L. Falcone, and Michael L. Cowell, Judges. Judgments modified, conditionally reversed, and remanded with directions.

George L. Schraer for Defendant and Appellant Tyshaun Jackson.

Barbara S. Perry, under appointment by the Court of Appeal, for Defendant and Appellant Garveia Brandon Freeny.

Kamala D. Harris, Attorney General, Gerald A. Engler and Lance E. Winters, Assistant Attorneys General, Victoria B. Wilson and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

Tyshaun Jackson and Garveia Brandon Freeny appeal from the judgments entered upon their jury convictions of first-degree murder, shooting at an occupied vehicle, and several firearm offenses.

Jackson argues that the court violated his right to counsel of choice and prejudicially erred in instructing the jury with the natural and probable consequences doctrine for aider and abettor liability. Jointly, appellants contend their Fourth Amendment rights were violated by the warrantless search of cell phones in their possession; their trial attorneys were ineffective for failing to object to the prosecutor's introduction of hearsay evidence, investigate and present exculpatory evidence, and impeach the prosecution's timeline at trial; the prosecution destroyed or failed to turn over exculpatory evidence; appellants were deprived of their right to a speedy trial; and the court erred in denying their motions for a new trial. Freeny also contends that his post-trial counsel had a conflict of interest and offered ineffective assistance. We do not agree with these contentions.[1]

Respondent concedes that appellants' sentence for shooting at an occupied vehicle should be stayed under Penal Code section 654,[2] and we modify the judgments accordingly. We also conditionally reverse the judgments and remand the case for a new in-camera hearing on appellants' *Pitchess* motions.[3]

FACTUAL AND PROCEDURAL SUMMARY

A few minutes before 10 a.m. on June 5, 2009, the victim, Edgar Kipp Eastman, was fatally shot while seated in a black Lexus. The vehicle was parked in front of a liquor store near the intersection of Pioneer Boulevard and Centralia Street in Lakewood.

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[1] In case No. B265204, Freeny filed a companion petition for writ of habeas corpus based on ineffective assistance of counsel. By order dated July 17, 2015, we indicated that the petition would be considered together with this appeal. The petition has been considered and is denied by separate order filed this date.

[2] All statutory references are to the Penal Code.

[3] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

Witnesses Robert Betts and his sister Nancy were stopped at the traffic light westbound on Centralia Street. Nancy was the driver, Robert the passenger. Robert heard seven to nine shots coming from the direction of the liquor store at the northwest corner. He saw that a white Cadillac CTS with chrome wheels and tinted windows was double parked next to a black Lexus on Pioneer Boulevard. He could not see the shooter because the Cadillac blocked his view of the Lexus, but he thought the sound of shots came from the Cadillac. Robert was looking at the car when he heard the shots. It had caught his attention because he worked on General Motors cars and liked the CTS model. The Cadillac rolled slowly into the intersection, turned right on Centralia Street, and headed west. Robert and his sister followed it until it disappeared from view over the hill spanning the 605 Freeway. Nancy turned the car around when she saw a sheriff's deputy travelling towards them on Centralia Street and returned to the scene of the shooting to give a statement. Both Robert and Nancy identified the Cadillac in which appellants were arrested later that morning as the car they had seen at the crime scene.

Witness Judy Sully was eastbound on Centralia Street. As she approached the intersection with Pioneer Avenue, she heard gunshots coming from the northwest corner of the intersection. She believed the shots came from a four-door Cadillac, which was next to another car that appeared to move with each shot she heard. The Cadillac turned west on Centralia Street and went over the freeway. Its windows were down, and Sully could tell there were two African American individuals inside, although she could not see them well. She saw a sheriff's deputy coming down the hill, and after calling her husband, returned to the crime scene. Sully was able to identify the car but not the occupants.

The murder was investigated by the Los Angeles County Sheriff's Department. Deputy Solorio was the first to arrive. Based on what he learned from witnesses at the scene, he broadcast that the suspect car was a white Cadillac with large chrome rims, last seen heading west on Centralia Street, and that there were two or three black males in the

car. Deputy Niebla, who arrived next, made a similar broadcast.[4] Deputy Esquivel arrived after Deputy Niebla. After speaking to an eyewitness named Samuel Torres, she broadcast that the suspect car was a four-door white Cadillac with tinted windows, headed west on Centralia Street, and that there were two black males in the car.

About a mile away from the scene, Deputy Nowell heard Deputy Niebla's broadcast and almost immediately spotted a white Cadillac matching the broadcast description. He made a U-turn and followed it. After running a check on its license plate, Deputy Nowell notified dispatch that he was following the suspect car.

After backup arrived, Deputy Nowell pulled over the Cadillac in a parking lot. Jackson was the driver; Freeny the passenger. The two men were handcuffed and placed in separate patrol cars. Their hands were later tested for gunshot residue without having been bagged. Freeny's kit yielded several particles characteristic of, or consistent with, gunshot residue; Jackson's did not. The prosecution's gunshot residue expert testified at trial that the presence of gunshot residue could have been due to handling or shooting a gun, being close to a shooting, or to environmental contamination. The kit from inside the Cadillac yielded numerous interesting particles, and the expert opined the interior of the car had been in "a gunshot residue environment at some point in time." Jackson's shirt was tested a year later; it yielded one characteristic particle and several which were inconclusive. Freeny's shirt was not preserved or tested.

A loaded nine-millimeter gun found in a space behind the Cadillac's glove compartment was not the gun used in the shooting. The route taken by the Cadillac over the freeway was searched, but no weapon was found. The murder scene was not searched for a weapon. Nine casings found at the scene all came from a 45-caliber gun. The casings were spread over a large area in front of and behind the Lexus. The prosecution's firearms expert testified at trial that bullet holes in the driver's door of that

[4] In a 911 call reporting the murder, a witness named Perla stated that two patrol cars had come to the scene in quick succession. Perla believed the shots had come from a small white four-door car that looked like a Camry; the car had no license plates and fled south on Pioneer Avenue towards Carson. None of this information was broadcast.

car indicated a northwest bound trajectory with a downward angle. If the bullets were fired from a car, the shooter's arm would have been extended outside the car since the casings were expelled onto the street. It was likely that the shooter was moving when the shots were fired because of the distance between the casings, but the expert could not determine whether the shots were fired from a moving vehicle.

During additional searches of the Cadillac, two cell phones were found in the center console. A magazine addressed to victim Eastman's home address and a postal delivery slip with his name and address were located respectively on the back seat and in the passenger seat back pocket. Deputy Robison searched the cell phones on the evening of the shooting and retrieved the number of one of the phones. The phone was registered to Tango 8, Inc., with an address in Long Beach. Cell phone tower records indicated that, on the morning of the shooting, calls to and from that phone accessed towers in Buena Park at 7:46 a.m., La Palma at 7:56 a.m., Cerritos at 7:59 and 8:00 a.m., Artesia at 8:04 a.m., Hawaiian Gardens between 8:53 and 9:13 a.m., Cerritos at 9:48 a.m., and Lakewood at 10:01 a.m.

Eastman had homes in Artesia and Buena Park. He had been seen at a fitness center in Cerritos that morning. He had some unidentified business relationship with Millie Lynette Williams, whom Jackson listed as next of kin on his booking slip. Williams was the secretary and agent for service of process of two corporations named "24 Tango Maintenance, Inc." and "Xpress Funding, Inc."; Eastman was their chief executive officer. Williams's listed address for these corporations was the same address in Long Beach to which the Tango 8, Inc. phone found in the Cadillac was billed.

Appellants were initially charged in case No. VA110848. At the preliminary hearing in that case, conducted in September 2009, Deputy Robison testified that witness Torres had identified appellant Freeny at a field showup and from a six-pack photo array. Appellants were held to answer, and a number of continuances ensued, some of them due to discovery issues. The court conducted an in-camera hearing on appellants' *Pitchess* motions and found no discoverable records in the personnel file of the officer who conducted the additional search of the Cadillac. In June 2011, the prosecution advised

the court that it was "having a witness issue," dismissed case No. VA110848, and refiled it as case No. VA120231. At the preliminary hearing in the latter case, appellants objected to Deputy Robison's testimony about Torres's identification of Freeny because Torres had died. Their motions to dismiss the charges for insufficient evidence were denied.

In July 2011, appellants were charged with murder (§ 187; count 1), carrying a loaded firearm (former § 12031, subd. (a)(1), now § 25850, subd. (a); count 2—Jackson, count 3—Freeny), carrying a concealed firearm (former § 12025, subd. (a)(1), now § 25400, subd. (a)(1); count 4—Jackson, count 5—Freeny), possession of a firearm by a felon (former § 12021, subd. (a)(1), now § 29800, subd. (a); count 6—Freeny, count 8—Jackson),[5] and shooting at an occupied vehicle (§ 246; count 9). As to count 1, it was alleged that a principal was armed with a firearm. (§ 12022, subd. (a)(1).) Additional firearm enhancements were alleged on counts 1 and 9 as to Freeny. (§ 12022.53, subd. (b)-(d).) A prior felony conviction was alleged as to each appellant.

Appellants admitted their non-violent drug-related felony priors. In June 2012, the jury convicted appellants as charged and found all firearm allegations to be true. Sentencing was repeatedly continued for close to two years. Appellants' motions for new trial were denied in April 2014. Each appellant was sentenced to five years on count 9, which was selected as the base count. On count 1, Jackson was sentenced to 25 years to life, plus a consecutive one-year term for the firearm enhancement, and Freeny was sentenced to 25 years to life, plus a consecutive term of 25 years to life on the firearm enhancement. Sentence was imposed and stayed on the remaining counts.[6] Each appellant was given 1785 days of presentence credit and assessed fines and fees. This appeal followed.

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[5] An additional firearm offense charged against Freeny (count 7) was dismissed on respondent's motion.

[6] The court misidentified count 6 as count 4 when sentencing Freeny. The abstract of judgment lists the correct count.

DISCUSSION

I

Jackson argues the trial court violated his Sixth Amendment right to counsel of choice by removing his privately retained attorney, Spencer Vodnoy, due to a potential conflict of interest. We disagree.

The issue arose at a hearing in March 2012 before Temporary Judge Michael L. Schuur. Vodnoy, who had represented Jackson since August 2011, advised the court that he was representing Williams in an unrelated perjury case involving the Department of Motor Vehicles. The prosecutor stated that he intended to subpoena Williams to testify about the nature of her relationship with Jackson and Eastman and expected that she would invoke her Fifth Amendment right against self-incrimination if asked additional questions.

According to Vodnoy, Jackson and Williams were married. Each had signed a conflict of interest waiver. Vodnoy said that he remained attorney of record for Williams in the perjury case only because she had failed to appear for sentencing. He also stated that the facts of the two cases were different and that he had not divulged facts relevant to one client's case to the other client. Vodnoy acknowledged that Williams was considered an "unindicted co-conspirator" in this case, but claimed that any conflict was purely theoretical because it was speculative that she would testify at all.

The court recognized it had discretion to remove conflicted counsel, and stated that if the case went forward in the face of the potential conflict, reversal would be required. Specifically, the court observed that if the prosecution gave Williams immunity or if Williams chose to testify, Vodnoy would not be able to cross-examine her effectively, resulting in a reversal, or he would have to declare a conflict of interest, resulting in a mistrial.

Wheat v. United States (1988) 486 U.S. 153 (*Wheat*) is the leading case on removal of conflicted counsel. In that case, three alleged co-conspirators agreed to waive any future conflict of interest and to be represented by the same attorney. (*Id*. at pp. 155–157.) The United States Supreme Court explained that while a defendant's right to select

and be represented by counsel of choice "is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." (*Id*. at p. 159.) The court explained that trial courts "must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses." (*Id*. at p. 163.)

In *People v. Jones* (2004) 33 Cal.4th 234, 241–242 (*Jones*), the California Supreme Court followed *Wheat*, *supra*, 486 U.S. 153 in denying a Sixth Amendment challenge to the removal of a defendant's appointed attorney because, in a previous unrelated matter, the attorney's law firm had represented a suspect in the murder with which the defendant had been charged. The court reasoned that information the suspect had given the law firm in the unrelated matter could have become relevant had the defense linked him to the murder. While the court acknowledged the likelihood that the suspect "had revealed such information may not have been great, it was enough to create a serious potential conflict of interest" for the attorney.

Here, attorney Vodnoy himself acknowledged that Williams was considered to be an "unindicted co-conspirator." Vodnoy did not say that he had not received confidential information from Williams; he only stated that he believed her perjury case was unrelated to Jackson's murder case, and that he had not divulged information about Williams's case to Jackson, or about Jackson's case to Williams. But as in *Jones*, *supra*, 33 Cal.4th 234, there was a potential for conflict if Williams was connected to the murder, and previously innocuous information she had given Vodnoy became relevant to Jackson's defense. Thus, even if Vodnoy ended his representation of Williams, he still could have a conflict because of his successive representation of Jackson. (See *People v. Baylis* (2006) 139 Cal.App.4th 1054, 1066 [successive representation threatens divulgence of confidential information].) At the time of the hearing, Vodnoy was still representing Williams, and that created a conflict based on his concurrent representation of clients with potentially

divergent interests. (*See id*. at p. 1065 [concurrent representation threatens attorney loyalty].)

That Williams was not actually called as a witness, or that, if called, she may have refused to testify by invoking the spousal privilege or her privilege against self-incrimination, is not dispositive. (See *Jones, supra,* 33 Cal.4th at p. 239 [suspect was unlikely to testify as witness at trial].) Under the right circumstances, she might have chosen to testify, so that cross-examining her could have created an actual conflict for the defense, leading to a mistrial or reversal. (See *Wheat, supra,* 486 U.S. at p. 161 [if court allows conflicted representation that impairs counsel's performance, defendant may bring ineffective assistance of counsel claim].) Courts have an interest in "'ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.'" (See *Jones*, at p. 240, quoting *Wheat*, at p. 160.) The trial court acted within its discretion to ensure the fairness of the proceeding and prevent potential future disruption.

Jackson argues that the waivers he and Williams signed cured any potential problem. As *Wheat, supra,* 486 U.S. 153 makes clear, courts are not required to accept waivers of conflict from criminal defendants, for several reasons. First, giving such defendants an absolute right to waive conflicts may jeopardize "the institutional interest in the rendition of just verdicts." (*Id.* at p. 160.) Second, determining the precise nature of a potential conflict "in the murkier pretrial context when relationships between parties are seen through a glass, darkly," in order to obtain an intelligent and knowing waiver, is not an easy task. "The likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials. It is a rare attorney who will be fortunate enough to learn the entire truth from his own client, much less be fully apprised before trial of what each of the Government's witnesses will say on the stand. A few bits of unforeseen testimony or a single previously unknown or unnoticed document may significantly shift the relationship between multiple defendants. These imponderables are difficult enough for a lawyer to assess, and even more difficult to convey by way of explanation to a criminal defendant untutored in the niceties of legal

ethics. Nor is it amiss to observe that the willingness of an attorney to obtain such waivers from his clients may bear an inverse relation to the care with which he conveys all the necessary information to them." (*Id*. at pp. 161–162.) Finally, a waiver often does not preclude an ineffective assistance of counsel claim because ""every reasonable presumption against the waiver of fundamental rights'" is indulged on appeal. (*Id*. at p. 162.)

Jackson contends that *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140 marks a significant departure from the analysis in *Wheat, supra*, 486 U.S. 153. We do not agree. The government in *Gonzalez-Lopez* conceded the defendant had been erroneously deprived of the counsel of his choice, and the issue before the high court was whether the conceded error was subject to harmless error analysis. (*Id.* at pp. 148–149.) As the court expressly warned, nothing in that case "casts any doubt or places any qualification upon [its] previous holdings that limit the right to counsel of choice and recognize the authority of trial courts to establish criteria for admitting lawyers to argue before them." (*Id*. at p. 51.)

Jackson also relies on *Alcocer v. Superior Court* (1988) 206 Cal.App.3d 951 (*Alcocer*) and earlier California Supreme Court cases cited in that decision for the proposition that the trial court's discretion to deprive a defendant of his right to counsel of choice is severely limited. (See e.g. *Maxwell v. Superior Court* (1982) 30 Cal.3d 606, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) The court in *Alcocer* declined to follow *Wheat, supra*, 486 U.S. 153, concluding that California law broadly protected a defendant's right to waive retained counsel's conflict of interest. (*Alcocer*, at pp. 956–957.) However, in *Jones, supra*, 33 Cal.4th 234, the California Supreme Court followed *Wheat*, concluding that it had superseded the line of earlier cases cited in *Alcocer*. (*Jones*, at p. 244.) The relevance of *Maxwell* and *Alcocer* to Jackson's Sixth Amendment challenge is dubious in light of *Jones*.

The *Jones* court cited *Alcocer, supra*, 206 Cal.App.3d 951 in a footnote where it declined to consider "whether the state Constitution permits a defendant to insist on being represented by a retained attorney who has a potential conflict of interest" because the

defendant's attorney in *Jones* was court appointed. (*Jones*, *supra*, 33 Cal.4th at p. 245, fn. 3.) Jackson does not clearly challenge Vodnoy's removal on state constitutional grounds. Even were we to read such a challenge into his argument and to assume *Alcocer* continues to be good law under the state Constitution, the case requires more than the perfunctory conflict waivers offered here, which stated only that the issue of attorney conflict had been explained to Jackson and Williams and they had been given an opportunity to consult with another attorney. (See *Alcocer*, at pp. 961–963; see also *People v. Baylis*, *supra*, 139 Cal.App.4th at p. 1068.) Nor does California law require trial courts to accept conflict waivers in all cases. (See *People v. McDermott* (2002) 28 Cal.4th 946, 990 [court may refuse waiver, but is not required to]; *People v. Baylis*, *supra*, 139 Cal.App.4th at p. 1071 [court may refuse waiver to avoid '"disruption of the orderly processes of justice unreasonable under the circumstances of the particular case'"]; *People v. Peoples* (1997) 51 Cal.App.4th 1592, 1599 [court may refuse waiver in interest of justice or to protect third parties].)

The trial court in this case acknowledged that California law may differ from federal law, but chose to remove Vodnoy because if the case went forward in the face of the potential conflict of interest, it would result in a mistrial or reversal. Jackson takes issue with this reasoning. He assumes no actual conflict would have materialized during trial or, if it had, it would not have been significant since, at most, Williams would have been "a tangential witness" who would have provided nothing of substance on the identity of the individuals involved in the shooting. But the fact that Williams had ties to both the victim and Jackson created a very real possibility that she might have information bearing on the murder, such as information germane to motive, that would be significant to both the prosecution and the defense. The prosecutor noted as much when he said he wanted to ask Williams questions on which she might invoke her privilege against self-incrimination.

It was entirely forseeable that an actual conflict could have arisen during trial if the prosecution granted Williams immunity and she decided to testify, leading Vodnoy to declare a conflict in the midst of trial as he learned more about the case, or risk providing

ineffective assistance of counsel if he failed to investigate potential defenses out of divided loyalty or failed to sufficiently cross-examine Williams with confidential information he already had. (See *Mickens v. Taylor* (2002) 535 U.S. 162, 173–174 [reversal required where actual conflict of interest affected counsel's performance]; *People v. Doolin, supra,* 45 Cal.4th at p. 421 [same].)

The trial court did not abuse its discretion in removing Vodnoy under the circumstances. Freeny's argument that Vodnoy's removal unjustifiably delayed trial necessarily fails as well.

Freeny claims that his own post-trial counsel, Kieran Brown, was conflicted because he originally had been appointed to represent Jackson after Vodnoy's removal. The record does not support this claim. Upon Vodnoy's removal on March 5, 2012, the court stated that it was "appointing the bar panel to represent" Jackson. The bar panel attorney present at the hearing was identified as "Miss Zamora." She stated that she was unable to take the case and that it would be reassigned within a day or two. The court put the case over to March 8 to give the bar panel "enough time to send an attorney down here." On March 8, Jackson appeared with a privately retained attorney and the court granted his request for substitution of counsel. Bar panel attorney Brown was present and relieved at the same time. There is no indication when he was assigned to the case, or that he ever represented Jackson. The record does not support a claim of potential, let alone actual, conflict of interest.

II

Jackson argues the court prejudicially erred in instructing the jury on the natural and probable consequences doctrine of aiding and abetting because the doctrine was not supported by substantial evidence, and it allowed the jury to convict him of first degree murder without finding that he aided and abetted premeditated murder. Respondent concedes that under *People v. Chiu* (2014) 59 Cal.4th 155, 166 (*Chiu*), an aider and abettor cannot be found guilty of first degree murder based on the natural and probable consequences doctrine, but argues that the instructional error was harmless. We agree.

In *Griffin v. United States* (1991) 502 U.S. 46, 60, the court explained that while it is preferable for the court to remove a factually insufficient legal theory from the jury's consideration, failure to do so is not reversible error. Following *Griffin*, the California Supreme Court held that "[i]f the inadequacy of proof is purely factual, of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) The court hypothesized that prejudice would be "affirmatively demonstrated" if the prosecutor stressed "only the invalid ground in the jury argument, and the jury asked the court questions during deliberations directed solely to the invalid ground." (*Ibid*.)

But in *Chiu, supra*, 59 Cal.4th 155, 166–167, the court held that instructing the jury on the natural and probable consequences doctrine in the context of first degree murder is legally erroneous because the doctrine does not require a finding that the accomplice acted with premeditation and deliberation. "When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground." (*Id*. at p. 167.) In *Chiu*, a high school brawl resulted in a deadly shooting. There was conflicting evidence about the defendant's role in the shooting. Some witnesses testified he had encouraged the shooter to get a gun and shoot the victim, but the defendant testified he did not know the shooter was armed and did not want or expect the shooting to occur. (*Id*. at p. 160.) The record suggested the jury was deadlocked because a holdout juror had a problem with the natural and probable consequences doctrine; once the holdout juror was removed, the jury reached a verdict. (*Id*. at pp. 167–168.) On that record, the court in *Chiu* could not conclude beyond a reasonable doubt that the defendant was convicted of first degree murder on the legally valid theory of directly aiding and abetting premeditated murder. (*Ibid*.)

Here, the jury was instructed on aiding and abetting murder, as well as aiding and abetting the predicate target crime of assault with a deadly weapon, of which murder was a natural and probable consequence. As Jackson points out, there is no evidence an

assault escalated into murder; rather, the assault in this case was indistinguishable from the murder. He, nevertheless, argues that the jury must have used the natural and probable consequences doctrine because that doctrine does not require a finding of "knowledge, intent and purpose that apply to direct aiding and abetting." That is not entirely accurate. The natural and probable consequences doctrine does require finding knowledge, intent and purpose of committing the predicate target offense on the part of the accomplice. (*People v. Prettyman* (1996) 14 Cal.4th 248, 262.) But if on the facts of the case the target offense is indistinguishable from first degree murder, then what the accomplice must have intended to facilitate is that murder.

Neither the prosecution nor the defense argued the natural and probable consequence theory to the jury, but Jackson is incorrect that direct aiding and abetting was not argued either. To the contrary, the prosecutor argued that appellants' plan was to find Eastman and kill him; to that end, Jackson drove to the victim's home and places the victim frequented, and when he found the victim, he did not drive away, but waited for Freeny to kill him and then calmly cruised away from the scene. The prosecutor stressed the connection between Jackson, Williams, and the victim, arguing that this was a "calculated assassination of a business partner." The prosecutor expressly rejected the possibility that shooting nine times at very close range showed an intent to frighten the victim. In essence, the prosecutor argued that the murder was preplanned by both appellants, who shared the same intent (to kill Eastman), and had premeditated and deliberated his murder.

Unlike the defendant in *Chiu, supra*, 59 Cal.4th 155, Jackson did not testify in his defense and did not admit to having been involved in an assault but not a murder. The defense's sole theory was that appellants were not involved in the shooting at all, based on the 911 call that the shooter was in a different car that went in a different direction.

The facts of this case support finding that Jackson either aided and abetted first degree murder or was entirely innocent. Thus, apart from the erroneous instruction, the record does not show that the natural and probable consequences doctrine was a theory of guilt actually presented to the jury, and nothing in the record suggests that the jury

actually considered that doctrine. The instructional error was harmless under any standard.

III

We next address Jackson's argument that the warrantless search of the cell phones retrieved from the Cadillac violated the Fourth Amendment under *Riley v. California* (2014) 134 S.Ct. 2473 (*Riley*). Freeny joins in this argument.

Riley, supra, 134 S.Ct. 2473 applies retroactively to cases pending on appeal. (See *Davis v. United States* (2011) 564 U.S. 229, 243 (*Davis*) ["newly announced rules of constitutional criminal procedure must apply 'retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception'"].) The *Riley* court declined to apply the search incident to arrest exception, which was developed in the context of physical objects, to warrantless searches of digital data stored in cell phones. (*Riley*, at p. 2484.) In adopting a bright-line rule against such searches, the court also rejected analogies to the vehicle exception. (Cf. *New York v. Belton* (1981) 453 U.S. 454, 460 & fn. 4 [allowing searches of contents of containers found in passenger compartment contemporaneous with arrest of occupant of vehicle and describing a "container" as "any object capable of holding another object"] & *Riley*, at p. 2491 ["Treating a cell phone as a container whose contents may be searched incident to an arrest is a bit strained as an initial matter . . . . But the analogy crumbles entirely when a cell phone is used to access data located elsewhere, at the tap of a screen"].) The court also declined to extend the standard for warrantless searches of the passenger compartment of a vehicle "when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle'" (*Arizona v. Gant* (2009) 556 U.S. 332, 343) because that standard "would prove no practical limit at all when it comes to cell phone searches." (*Riley*, at p. 2492.) As the Ninth Circuit has observed, in light of this analysis, there is no reason to conclude that warrantless cell phone searches are allowed under the vehicle exception. (*United States v. Camou* (9th Cir. 2014) 773 F.3d 932, 942.)

Even if *Riley, supra*, 134 S.Ct. 2473 applies to the search of the cell phones found in the Cadillac, appellants' immediate problem is that they did not move to suppress the

evidence obtained through that search, and respondent argues that the issue is forfeited. A constitutional issue raised for the first time on appeal may be considered only to the extent it presents a pure question of law on undisputed facts. (*People v. Mitchell* (2012) 209 Cal.App.4th 1364, 1370.) Alternatively, an issue will be deemed forfeited where the reviewing court is asked to apply the law to the facts despite "a critical factual dispute that the trial court never was asked to explore or resolve . . . ." (*People v. Williams* (2008) 43 Cal.4th 584, 625.)

Respondent initially objected that Freeny had no reasonable expectation of privacy in the Cadillac or the cell phones because, as a passenger, he could claim "neither a property nor a possessory interest in the automobile, nor an interest in the property seized." (*Rakas v. Illinois* (1978) 439 U.S. 128, 148; *People v. Valdez* (2004) 32 Cal.4th 73, 122.) After we requested additional briefing on whether there is evidence in the record that appellants may claim a reasonable expectation of privacy in the cell phones, respondent argued there was no such evidence as to either appellant. We agree.

The Fourth Amendment protects against unreasonable governmental intrusion into areas subject to a legitimate expectation of privacy. """'One of the main rights attaching to property is the right to exclude others, [citation], and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.' [Citation.]" [Citation.]" (*People v. Stewart* (2003) 113 Cal.App.4th 242, 250.) Some factors to be considered are "whether the defendant has a property or possessory interest in the thing seized or the place searched, whether he has a right to exclude others from that place [or the thing seized], whether he has exhibited a subjective expectation of privacy that it would remain free from governmental intrusion, whether he took normal precautions to maintain privacy, and whether he was legitimately on the premises [or legitimately in possession of the thing seized]." (*United States v. Lopez-Cruz* (9th Cir. 2013) 730 F.3d 803, 808.)

On the briefing and record before us, we cannot determine whether either appellant could assert a legitimate Fourth Amendment interest in the Cadillac or cell phones. Neither appellant owned the Cadillac, which contained items connected to the

victim and was released to an owner unidentified at trial. There also is no clear indication whether either appellant could claim valid possession or use of the car; in fact, at trial, the defense capitalized on the absence of evidence of how appellants found themselves in the car in the first place.[7]

Nor is there evidence that appellants owned the cell phones found in the car. The only evidence is that the cell phone used to track their movements on the morning of the shooting was registered to Tango 8, Inc., but there is no evidence whether either appellant made permissive use of the phone or whether they shared it. Jackson argues that since the phone was billed to Williams's address, and since Williams is his wife, it is reasonable to infer he legitimately possessed and used the phone. Freeny claims that Jackson's arguments apply equally to him.

To the extent appellants invite us to draw factual inferences favorable to their Fourth Amendment claim on a record that provides scant support for it and is susceptible to other reasonable inferences,[8] the invitation contravenes the basic rule of appellate review that on appeal the correctness of the judgment is presumed; all "'"intendments . . . are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown."' [Citations.]" (*People v. Leonard* (2014) 228 Cal.App.4th 465, 478.) Absent an affirmative showing that appellants claimed a legitimate expectation of privacy in the cell phones and the Cadillac where the phones

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[7] Jackson's attorney asked a series of rhetorical questions to that effect: "Who was the person who owned the Cadillac? Who possessed the Cadillac? Did that person have any relation to Mr. Eastman? . . . I mean, you don't know. . . . [¶] [Y]ou weren't presented evidence on who owned that Cadillac, who it was returned to, whether it is a man, a woman, what their connection is if at all. You don't know. . . [¶] [T]here is no way to know . . . whether Mr. Jackson was in that car for, you know 10 minutes or an hour or all morning. . . ."

[8] The prosecutor argued that the phone was tied to the victim because the address to which it was billed was the same address as that used for the victim's two corporations. Jackson's counsel questioned the unexplained fact that the phone sent a text message after having been seized.

were found, it is unnecessary to decide whether the search violated the Fourth Amendment. (See *Rakas v. Illinois*, *supra*, 439 U.S. at p. 150.)

Assuming for the sake of argument that appellants may claim a Fourth Amendment violation, their failure to move to suppress the evidence at trial may be excused only if '"governing law at the time . . . afforded scant grounds for objection.' [Citation.]" (*People v. Edwards* (2013) 57 Cal.4th 658, 705.) Thus, appellants would be excused from having to anticipate "unforeseen changes in the law" or make "fruitless objections" in the hope "that an established rule of evidence would be changed on appeal." (*Ibid*.) At the time of trial in June 2012, warrantless cell phone searches incident to arrest were authorized in California under *People v. Diaz* (2011) 51 Cal.4th 84, cert. denied Oct. 3, 2011, 132 S.Ct. 94 (*Diaz*). Only in January 2014 did the United States Supreme Court grant certiorari in the two cases that eventually led to the outlawing of warrantless cell phone searches in *Riley*, *supra*, 134 S.Ct. 2473. (See *Riley v. California* (2014) 134 S.Ct. 999; *U.S. v. Wurie* (2014) 134 S.Ct. 999.) Jackson argues that in light of *Diaz*, there were scant grounds for objection to the introduction of the cell phone evidence at appellants' trial.

If the change in the constitutionality of warrantless cell phone searches was unforeseen, suppressing the evidence from the searches would have little deterrent value. Under the good faith exception, even invalid searches are not subject to the exclusionary rule if they were "conducted in objectively reasonable reliance on binding appellate precedent." (*Davis*, *supra*, 131 S.Ct. at pp. 2423–2424.) That is because the exclusionary rule is intended to apply when the police exhibit "deliberate," "reckless," or "grossly negligent" disregard for Fourth Amendment rights. (*Id*. at p. 2427.)

The issue of whether the good faith exception applies to searches conducted pursuant to *Diaz*, *supra*, 51 Cal.4th 84 is pending before the California Supreme Court. (See *People v. Macabeo* (2014) 229 Cal.App.4th 486, review granted Nov. 25, 2014, S221852.) That the search in this case was conducted before *Diaz* does not necessarily take it outside the good faith exception because the rationale of *Davis*, *supra*, 131 S.Ct. 2419 is not limited to binding precedent in the same jurisdiction '"specific to the facts at

hand.' [Citation.]" (*U.S. v. Katzin* (3d Cir. 2014) 769 F.3d 163, 177.) It applies also to police action reasonably based on existing United States Supreme Court precedent. (*Id.* at p. 173 [high court beeper cases reasonably applied to GPS tracking device cases]; see also *United States v. Aguiar* (2d Cir. 2013) 737 F.3d 251, 261 [same].) Even if *Davis* does not extend to nonbinding precedent from other jurisdictions, the existence of such precedent may support the reasonableness of police action, particularly if it presents "nearly uniform consensus." (*Katzin*, at p. 180; *Aguiar* at p. 262)

The search in this case took place in mid-2009. In reviewing the state of the law on warrantless searches of cell phones at the end of that year, the Ohio Supreme Court noted that courts had analogized searches of pagers, computer memo books, and cell phones to searches of closed containers permitted under United States Supreme Court precedent. (See *State v. Smith* (2009) 124 Ohio St.3d 163, 166–168, citing *New York v. Belton*, *supra*, 453 U.S. at p. 460, fn. 4; *United States v. Robinson* (1973) 414 U.S. 218 [cigarette package containing drugs]; *United States v. Finley* (5th Cir. 2007) 477 F.3d 250, 260 [cell phone concededly analogous to closed container]; *United States v. Ortiz* (7th Cir. 1996) 84 F.3d 977, 984 [pager analogous to closed container]; *United States v. Chan* (N.D.Cal. 1993) 830 F.Supp. 531, 534 [same]; *United States v. David* (D.Nev. 1991) 756 F.Supp. 1385, 1390 [computer memo book "indistinguishable from any other closed container"]; see also *United States v. Murphy* (4th Cir. 2009) 552 F.3d 405, 411 [warrantless cell phone search allowed to preserve evidence]; *U.S. v. McCray* (S.D.Ga., Jan. 5, 2009, No. CR408-231) 2009 WL 29607 [collecting cases upholding searches of papers, wallets, and address books, as well as cases extending same rationale to electronic storage devices].)

Jackson points out that by 2009 some courts had declined to validate warrantless cell phone searches. (See *United States v. Park* (N.D.Cal. May 23, 2007, CR 05–375 SI) 2007 WL 1521573 [distinguishing cell phones from pagers and address books based on quality and quantity of stored information]; *United States v. Quintana* (M.D. Fla. 2009) 594 F.Supp.2d 1291, 1300 [finding warrantless search of cell phone's digital photo album "had nothing to do with officer safety or the preservation of evidence related to" arrest

for driving with suspended license]; *United States v. Wall* (S.D.Fla. Dec. 22, 2008, No. 8–600016–CR) 2008 WL 5381412 [distinguishing cell phones from pagers and analogizing them to sealed letters].)

While not completely uniform, the general tendency over more than two decades had been to allow searches of wallets and address books, and by analogy to also allow searches of electronic devices, such as beepers, pagers, and cell phones. This was true even after the search in this case, when the California Supreme Court in *Diaz*, *supra*, 51 Cal.4th 84 validated a 2007 warrantless search of a cell phone under existing United States Supreme Court precedent. As one court has noted, "a court would be hard-pressed to place culpability" on officers "for their actions in 2009" when subsequent binding precedent validated the conduct in which they engaged. (*U.S. v. Leon* (D. Hawaii 2012) 856 F.Supp.2d 1188, 1194.)

We recognize that the application of the good faith exception to pre-*Riley* warrantless cell phone searches is still in flux, and Jackson cites several cases that have concluded that warrantless cell phone searches are not protected by the good faith exception. (See, e.g., *U.S. v. Eisenhour* (D. Nev. 2014) 44 F.Supp.3d 1028, 1032; *State v. Thomas* (Okla. Crim. App. 2014) 334 P.3d 941, 946; *Willis v. State* (Fla. Dist. Ct. App. 2014) 148 So.3d 480, 483.) Even so, a growing number of courts have concluded that such searches fall within the good faith exception despite the absence of local binding precedent because *Riley*, *supra*, 134 S.Ct. 2473 changed the bright-line search rules established by earlier United States Supreme Court cases. (See, e.g., *United States v. Gary* (7th Cir. 2015) 790 F.3d 704, 710; *Rivera v. Commonwealth* (2015) 65 Va.App. 379, 391; *Spence v. State* (2015) 444 Md. 1, 13 & fn. 3; *U.S. v. Clark* (E.D. Tenn. 2014) 29 F.Supp.3d 1131, 1145.)

In light of the unclear facts and unsettled state of the law, we decline to find that a violation of appellants' Fourth Amendment rights occurred or that, if it occurred, it requires the exclusion of evidence obtained from the search of the cell phones.

IV

Both appellants contend their trial attorneys provided ineffective assistance when they failed to object to Deputy Bracks's trial testimony that deceased witness Torres had made a field identification. Freeny separately contends that the reliance on hearsay evidence about Torres's field identification at the preliminary hearing rendered the prosecution in this case unconstitutionally invalid from its inception, that the prosecutor committed misconduct in eliciting testimony about the field identification at trial, and that Judge Michael A. Cowell erroneously denied the motion for new trial on this ground. Jackson joins these arguments.

Section 872, which allows hearsay evidence at preliminary hearings, was held constitutional in *Whitman v. Superior Court* (1991) 54 Cal.3d 1063. Because the court in *Whitman* referenced the federal requirement of reliability under *Ohio v. Roberts* (1980) 448 U.S. 56, a case abrogated in *Crawford v. Washington* (2004) 541 U.S. 36, Freeny argues that *Crawford*'s confrontation requirements have been imported through *Whitman* into section 872 as a limitation on the reliability of hearsay evidence. As both the United States and California Supreme Courts have recognized, the Sixth Amendment right to confront witnesses does not apply to pre-trial proceedings. (See *Peterson v. California* (9th Cir. 2010) 604 F.3d 1166, 1169, citing *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 52 [confrontation is a trial right]; *Whitman*, at p. 271 [preliminary hearings are not constitutionally mandated].) *Crawford* did not expand that right. (*Peterson*, at p. 1170.)

Moreover, any irregularities in a preliminary hearing "which are not jurisdictional in the fundamental sense" are subject to harmless error analysis and "require reversal only if the defendant can show that he was *deprived of a fair trial or otherwise suffered prejudice* as a result of the error . . . ." (*People v. Stewart* (2004) 33 Cal.4th 425, 461–462.) Thus, the real question is whether appellants were prejudiced by the introduction of testimony about the field identification at trial.

Witness Torres made statements to Deputy Esquivel at the crime scene and later identified Freeny at a field showup. At a hearing on appellants' motion in limine, the prosecutor agreed that Torres's identification of Freeny would be inadmissible, but not

the fact that a police broadcast was made or that Torres was taken to a field showup based on something he said at the crime scene. Judge Dewey Falcone, who presided over appellants' trial, concluded that Torres's statements at the crime scene qualified as excited utterance, but his field identification was inadmissible hearsay.

At trial, Deputy Esquivel was allowed to testify about the content of her broadcast based on what Torres had told her. The court overruled defense counsel's hearsay objection and denied the motion to strike Esquivel's testimony. Appellants do not challenge the admission of Deputy Esquivel's testimony. In any case, the evidence at trial indicated that appellants were stopped based on Deputy Niebla's broadcast, which preceded Deputy Esquivel's, and Torres's description of the car and its occupants was largely cumulative of Sully's trial testimony.

Deputy Bracks testified that while he was being transported to where appellants were detained, Torres was concerned for his safety because he asked to be seated out of view directly behind the officer. At sidebar, the prosecutor requested clarification whether the field identification could come in as a spontaneous statement based on Torres's reported demeanor. Jackson's attorney objected that a field identification cannot be an excited utterance, regardless of how close in time to the crime it occurs or how nervous a witness is. The court told the prosecutor that the defense had "a pretty good objection." When examination resumed after a break, the prosecutor asked Deputy Bracks, "Without telling us what Mr. Torres said, was he able to make an identification?" Deputy Bracks responded, "Yes, Sir, he was." The prosecutor asked, "And then what did you do next?" Deputy Bracks explained, "That was after he made his identification, Sir. [¶] After he made his identification, I transported him to the station for the homicide interview." The defense did not move to strike Deputy Bracks's testimony or to limit the purpose for which it was introduced.

In closing, the prosecutor did not rely on Torres's field identification; instead, he conceded, "We don't have an I.D., but you don't need an I.D. This is where circumstantial evidence comes in. It's not like two other guys jumped into the car." The defense emphasized the prosecutor's concession: "[T]he prosecutor told us a few

moments ago there's no I.D. in this case. . . . There's no I.D. and there's no .45 gun. . . . [¶] [T]his is a case where there is no identification . . . ." In rebuttal, the prosecutor mentioned in passing the parties' stipulation that Torres was dead and could not be called as a witness. He then focused on the trial testimony of Robert Betts and Judy Sully, and again acknowledged the lack of identification of appellants: "Well, according to [defense] counsel, unless you have an I.D., you can't make a case. So that—I guess that means if you wear a mask, you get off free, because no one can ever convict you of anything no matter what the evidence is, because they had a mask on. There is no I.D."

The jury began deliberations at 3:00 p.m. on June 8, 2012. At 4:00 p.m., it asked for a readback of testimony regarding gunshot residue evidence and was ordered to return at 9:00 a.m. on June 11, which it did. At 9:13 a.m. on that day, the jury cancelled its earlier readback request. At 9:35 a.m., it requested readback of Deputy Bracks's testimony "on witness Torres, when taken to . . . [the] Cadillac. . . ." The readback took place between 9:50 and 9:55 a.m., and the jury announced it had reached a verdict at 10:18 a.m.

Freeny argues that Deputy Bracks's testimony about Torres's field identification was inadmissible testimonial hearsay, and that the prosecutor's elicitation of the testimony was deliberate misconduct in light of the court's ruling on the defense's objection. Freeny contends the testimony was prejudicial because the jury focused on it during deliberations.

"It is misconduct for a prosecutor to violate a court ruling by eliciting or attempting to elicit inadmissible evidence in violation of a court order. [Citation.]" (*People v. Crew* (2003) 31 Cal.4th 822, 839.) However, the claim is not "preserved for appeal if defendant fails to object and seek an admonition if an objection and jury admonition would have cured the injury. [Citation.]" (*Ibid.*) Appellants acknowledge that their trial counsel did not object to the elicitation of Deputy Bracks's testimony after the sidebar, and did not move to strike the testimony. The failure to do so, they contend, amounted to ineffective assistance of counsel.

To establish ineffective assistance of counsel based on the failure to object to prosecutorial misconduct, a defendant must show both that counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms, and that it is reasonably probable the verdict would have been more favorable to him absent counsel's deficiency. (See *People v. Hernandez* (2004) 33 Cal.4th 1040, 1052–1053.) "We presume that counsel rendered adequate assistance and exercised reasonable professional judgment in making significant trial decisions." (*People v. Holt* (1997) 15 Cal.4th 619, 703) To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we must affirm the judgment unless counsel was asked for an explanation and failed to provide one, or unless there could be no satisfactory explanation for counsel's conduct. (*People v. Gray* (2005) 37 Cal.4th 168, 207.)

On the record before us, we do not conclude that defense counsel rendered ineffective assistance. Assuming the prosecutor elicited testimonial hearsay (*Michigan v. Bryant* (2011) 562 U.S. 344, 358), neither the question nor the answer made it clear who or what Torres had identified. The caveat that the prosecutor did not want the jury to hear what Torres actually said and the absence of any reference to the field identification in closing suggest that the prosecution did not intend to elicit or use the testimony for its truth. Had the prosecutor followed up by asking Deputy Bracks who Torres had identified, or had he relied on the field identification in closing argument, there would be no satisfactory explanation for counsel's failure to object, move to strike, or move to admonish the jury. (See *People v. Blacksher* (2011) 52 Cal.4th 769, 829 [defendant could have sought jury admonition either during testimony or during prosecutor's closing arguments].) As it is, the prosecutor argued in closing that there was no identification of appellants, and so did the defense. Under the circumstances, defense counsel's decision not to move to strike the testimony was not an unreasonable tactical decision. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 502 ["[D]eciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance"].)

We also are not convinced that the request for a readback of Deputy Bracks's testimony indicates the jury based its verdict on Torres's field identification. Contrary to Freeny's suggestion, the jury's notes to the trial judge do not indicate that the jury changed course based on Deputy Bracks's testimony. The notes suggest the jurors had resolved their issues with the gunshot residue evidence before they asked for and received the readback of Deputy Bracks's testimony. But they do not reveal how many jurors were interested in the readback or for what reason, and we do not speculate as to the reason for the jury's request. (See *People v. Houston* (2005) 130 Cal.App.4th 279, 301.) Nor do we assume the jury unreasonably speculated that Torres identified appellants even though the prosecutor did not elicit testimony to that effect and both the prosecution and defense repeatedly told the jury in closing argument that there was no such identification. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1127 [We do not "*assume* an unreasonable jury"].)

Since we find that counsel's failure to move to strike Deputy Bracks's testimony did not amount to ineffective assistance, appellants' argument that they were entitled to a new trial on this ground also fails.

V

Freeny raises additional ineffective assistance of counsel claims. He argues that his trial counsel, Paul Kelly, was ineffective because he failed to impeach prosecution witnesses, locate exculpatory witnesses, and present exculpatory gunshot residue evidence, and that his post-trial counsel, Kieran Brown, was ineffective because he failed to move for a new trial based on trial counsel's ineffective assistance.

As we explained, counsel's decisions are presumed reasonable on appeal unless there could be no satisfactory explanation for them, and the defendant shows a reasonable probability of a more favorable verdict absent counsel's deficiency. (*People v. Gray*, *supra*, 37 Cal.4th at p. 207; *People v. Hernandez*, *supra*, 33 Cal.4th at pp. 1052–1053; *People v. Holt*, *supra*, 15 Cal.4th at p. 703.)

Freeny claims that Kelly should have impeached Deputy Nowell's trial testimony that he heard the broadcast about the shooting at approximately 9:56 a.m. with his

testimony at an earlier suppression hearing that he heard it at approximately 10:30 a.m. Both times, the officer responded to leading questions that included time approximations. It was reasonable for counsel not to press the issue on cross-examination and risk an answer that confirmed that appellants' car was located within a short time of the shooting. At the suppression hearing, Deputy Esquivel, too, had testified she responded to the scene of the crime at approximately 10:30 a.m. But at trial, she testified she responded within less than five minutes of receiving a call about the shooting, and the crime scene log listed her arrival time as 10:20 a.m. Even that time was disputed because the incident report indicated Deputy Solorio's involvement began at 9:56 a.m., and he estimated Deputy Nowell's broadcast about finding the suspect car came within two minutes.

Freeny also claims that Kelly was ineffective for failing to call a gunshot residue expert to rebut the prosecution's gunshot residue evidence, as was Brown for failing to include this claim in Freeny's motion for a new trial. Jackson's motion included such a claim based on a report obtained post-trial from gunshot residue expert Bryan Burnett. Burnett's report stated that the gunshot residue inside the Cadillac could not have been deposited during the shooting if the shooter's hand was extended through the window. Jackson's motion indicated that his trial counsel had consulted with the expert, but had chosen not to call him at trial. Brown represented that during pretrial discussions about the evidence in this case Burnett had told Kelly that his testimony would not be inconsistent with that of the prosecution's gunshot residue expert.

Freeny faults Brown for infringing on attorney-client privilege in making this representation, and claims Kelly should have approached Burnett again during trial or should have provided him with copies of the gunshot residue expert's reports. The attorney-client privilege does not apply when there is a claim of ineffective assistance of counsel. (*People v. Ledesma* (2006) 39 Cal.4th 641, 690.) Freeny's assumption that the pretrial discussions between Kelly and Burnett were superficial is itself speculative since there is no information in the record regarding the depth of their discussions about the evidence. Burnett's conclusions were largely based on the ballistics evidence, which

indicated that the gun was shot outside the car. On the record before us, we cannot determine whether or not the location of the casings and the ballistics expert's conclusions had been part of the pretrial discussions with Burnett, nor is it clear why the importance of the ballistics evidence to Burnett's analysis should have been apparent to Kelly.

Freeny also faults Kelly for failing to locate exculpatory witnesses, such as the 911 caller, but Brown represented that Kelly's investigator had unsuccessfully attempted to locate those witnesses. We cannot conclude from the record on appeal that Kelly's decision not to call a rebuttal gunshot residue witness at trial or his investigator's inability to locate witnesses was unreasonable. Since the claim of Brown's ineffectiveness is derivative of Kelly's, we reject both claims.

Jackson's joinder in Freeny's ineffective assistance of counsel argument is without merit because it assumes the same facts apply to his own attorney.

VI

Freeny asserts several discovery violations and argues that the prosecution's delaying tactics with respect to discovery deprived him of a fair trial.

Under *Brady v. Maryland* (1963) 373 U.S. 83, 86–87 (*Brady*), the prosecution must disclose any material evidence that is "favorable to the accused." The concomitant obligation to retain evidence is narrower, and the "failure to retain evidence violates due process only when that evidence 'might be expected to play a significant role in the suspect's defense,' and has 'exculpatory value [that is] apparent before [it is] destroyed.' (*California v. Trombetta* (1984) 467 U.S. 479, 488–489 [*Trombetta*].) In that regard, the mere 'possibility' that information in the prosecution's possession may ultimately prove exculpatory 'is not enough to satisfy the standard of constitutional materiality.' (*Arizona v. Youngblood* (1988) 488 U.S. 51, 56 [*Youngblood*].)" (*City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 8.) When the exculpatory value of the evidence requires subjecting it to tests, the defendant must show bad faith on the part of the police in failing to preserve potentially useful evidence. (*Youngblood*, at pp. 57–58.) "The presence or absence of bad faith by the police . . . must necessarily turn on the police's knowledge of

the exculpatory value of the evidence at the time it was lost or destroyed. [Citation.]" (*Id*. at p. 57, fn. *.)

Freeny complains that when his counsel sought to have his shirt tested more than a year after the shooting, he initially was told that it had been washed; he later was told Freeny was not wearing a shirt when he arrived in jail even though a booking slip showed he was wearing a shirt when he was booked. At trial, Ronald Pinkney, the jail custodian supervisor, testified that when inmates are processed upon arrival, they are given a plastic bag and an inventory I.D. card to put in the bag; clothing without an inventory card is discarded. Pinkney stated that at the time of Freeny's arrest, the clothing was inconsistently processed by trustees. Deputy Garcia reported Pinkney had told him inmates often discard their clothing.

Freeny capitalizes on discrepancies in the information the prosecutor and various officers provided regarding his shirt in order to claim that it must have been destroyed in bad faith. The record does not clearly indicate when or how the shirt was lost, nor does it show it was destroyed. What is clear is that it could not be found at the time Freeny's counsel asked for it. Freeny claims the prosecution maintained that no gunshot residue reports existed as late as 2011. That is incorrect. The record in case No. VA110848 shows that the initial gunshot residue results from appellants' hands were expected by the end of 2009. The results from the later testing of Jackson's clothing were turned over by September 2010, along with a report on the disappearance of Freeny's clothing. What was at issue in 2011 was Freeny's motion about the transfer of gunshot residue evidence from police officers or police cars to defendants.

Because it needed to be subjected to testing, Freeny's shirt was at best potentially useful. (*Youngblood, supra*, 488 U.S. at p. 57–58.) We cannot conclude the police destroyed it knowing that it would have been useful to the defense. The test results showed that the interior of the Cadillac was rich in gunshot residue, and at the time the police reported it could not find Freeny's shirt, gunshot residue already had been found on Jackson's shirt. Appellants had been handcuffed and transported in police cars, and at trial the expert testified that he could not eliminate the possibility of environmental

contamination. In light of that, it is unlikely that testing Freeny's shirt would have turned up meaningful results, and there is no reason to conclude the shirt was destroyed because of its exculpatory value.

Freeny also complains that the prosecution failed to investigate and turn over the contact information of the 911 caller. At a hearing in case No. VA110848, the prosecution represented that it had made a good faith effort to do so. Specifically, the prosecutor stated he had copied the tape of the 911 call and given it to the investigating officer, "and that is the number they cannot get." Freeny's counsel did not ask for additional information or claim a *Brady* or *Trombetta* violation, and no additional facts were developed on the record.

Freeny represents that a caller's phone number is automatically generated during a 911 call; hence, the prosecution must have had the 911 caller's contact information. He claims the prosecutor's statement during closing argument that the 911 tape was time stamped 9:55 a.m. shows that the prosecution had more information than it disclosed since the transcript introduced at trial bore no time stamp. We decline to speculate what may have happened to the caller's phone number in this case. Whether or not a tape was introduced at trial, the record of the proceedings in case No. VA110848 indicates that a tape was turned over to the defense, and the defense, too, referenced the time of the 911 call in closing.

Freeny urges us to consider extra-record evidence he submitted in support of his petition for writ of habeas corpus, which he attempts to introduce on appeal "in furtherance of judicial economy." The appeal and petition have not been consolidated for review, and there is no authority for their consolidated review. Freeny apparently misunderstands *People v. Waidla* (2000) 22 Cal.4th 690, which makes that clear: "An appeal is 'limited to the four corners of the [underlying] record on appeal . . . .' [Citation.] Habeas corpus is not. [Citation.] Hence, consolidation is not necessary for consideration and decision of [the defendant's] appeal *vis-a-vis his habeas corpus petition.* Indeed, it is inappropriate, inasmuch as the habeas corpus petition extends far beyond the record on appeal. Neither is consolidation necessary for consideration and

decision of his habeas corpus petition *vis-a-vis his appeal*. The habeas corpus petition is not confined to the record on appeal." (*Id*. at p. 703, fn. 1.) The court in *Waidla* rejected arguments based on evidence not in the record on appeal. (*Id*. at pp. 743–745.) So do we.

Freeny argues he was denied the right to a speedy trial due to the prosecution's delay and failure to turn over exculpatory evidence. A speedy trial claim generally requires a balancing of four factors, along with any other relevant circumstances: '"whether delay before trial was uncommonly long, whether the government or the criminal defendant is more to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice as the delay's result.'" (*People v. Williams* (2013) 58 Cal.4th 197, 233 (*Williams*), quoting *Doggett v. United States* (1992) 505 U.S. 647, 651 (*Doggett*).)

The three-year delay in this case is "presumptively prejudicial," but it may weigh less heavily because the complexities of the two-defendant first-degree murder charges distinguish this case from "the routine prosecution of an ordinary street crime." (*Williams*, *supra*, 58 Cal.4th at pp. 234–235.) Freeny claims the delay impaired his defense, citing the faded memories of exculpatory witnesses identified in his habeas petition. While the extra-record evidence is not properly before us on appeal, courts generally recognize that '"excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify.' [Citation.]" (*Id*. at p. 236.) The more important question, however, is the reason for the delay. (*Id*. at p. 237.)

"On one hand, delay occasioned by diligent prosecution would be 'wholly justifiable' and would not support a defendant's speedy trial claim absent a showing of 'specific prejudice to his defense.' [Citation.] On the other hand, 'official bad faith in causing delay will be weighed heavily against the government' and, in a case of extraordinarily lengthy delay, 'would present an overwhelming case for dismissal' even without any specific showing of prejudice. [Citation.] . . . 'Between diligent prosecution and bad-faith delay, official negligence in bringing an accused to trial occupies the

middle ground. While not compelling relief in every case where bad-faith delay would make relief virtually automatic, neither is negligence automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him. . . . Thus, our toleration of such negligence varies inversely with its protractedness, [citation], and its consequent threat to the fairness of the accused's trial.' [Citation.]" (*Williams*, *supra*, 58 Cal.4th at p. 237, quoting *Doggett*, *supra*, 505 U.S. at pp. 656–657.)

As respondent points out, the vast majority of delays in this case are attributable to continuances requested by the defense. The reason for some of them is not apparent; Jackson's repeated change of counsel explains others. Freeny's claim that the prosecution's bad faith discovery responses are the main reason for the three-year delay is not supported by the record on appeal.

It appears that counsel did not request Freeny's clothing until May 2010, almost a year after appellants' arrest. Counsel was told the clothes had been washed and requested proof. In follow-up discussions, the prosecution clarified that the initial representation was incorrect, and that the clothes could not be found. In August 2010, Freeny's counsel demanded documentation about the disappearance of the clothes. At a hearing in October 2012, the prosecutor stated there was no record of what happened to them. Meanwhile, discovery proceeded on other matters, such as appellants' *Pitchess* motions, and appellants' attorneys acknowledged that the prosecution and detectives were cooperating with discovery requests. The case was continued when Jackson's counsel was substituted. Thus, the complication caused by the disappearance of Freeny's clothes was not the sole cause of delay during this five-month period.

Another discovery complication occurred in early 2011, when Freeny's counsel requested information about the 911 call. In February 2011, the prosecutor told the court that he had forwarded the request to the investigating officer. The response he provided misidentified the caller as "Alva" and claimed that no contact information was available. In March, the court suggested that the attorneys listen to the 911 tape together to determine the name of the caller. By April, the confusion about the name had been resolved, but the prosecutor stood by his earlier representation that there was no contact

information for the caller. During this four-month period, discovery proceeded on other matters, and the trial was continued for other reasons as well.

As we have explained, nothing in the record suggests that Freeny's clothing was destroyed in bad faith, or that the prosecution deliberately failed to provide the 911 caller's contact information. Thus, the errors about the clothing and the caller's name were no more than negligent. Nor did they contribute appreciably to the delay in bringing the case to trial. We, therefore, reject Freeny's claim that his speedy trial rights were violated due to deliberate discovery delays.

Jackson has joined in these arguments. To the extent they pertain to him at all, we reject them for the same reasons.

VII

Jackson contends that the cumulative effect of the claimed trial errors mandates reversal of his conviction. Because we have rejected all other claims, the claim of cumulative error also fails. (See *People v. Sapp* (2003) 31 Cal.4th 240, 316.)

VIII

Appellants argue that the five-year consecutive term each received for shooting into an occupied vehicle (count 9) should have been stayed under section 654, which prohibits punishing more than once an act, or an indivisible course of conduct incident to a single objective, that gives rise to several offenses. (See *People v. Sok* (2010) 181 Cal.App.4th 88, 99.) Respondent agrees that the crimes of murder and shooting at an occupied vehicle are predicated on an indivisible course of conduct pursuant to a single objective: to kill the victim. (See *id.* [§ 654 applies to attempted murder and shooting at an occupied vehicle].) We modify the judgments to stay the sentence imposed on count 9 as to each appellant.

IX

Appellants ask that we review the record of the sealed in-camera hearing on their *Pitchess* motions conducted by Judge Margaret M. Bernal in case No. VA110848. Based on declarations filed under seal, the court found good cause to review the personnel records of Deputy Corina, one of the officers who searched the Cadillac and found the

two cell phones, as well as the magazine and postal slip bearing the victim's address. The court limited the review to records relevant to fabrication. Our review of the sealed portion of the record indicates that, in camera, the court asked the custodian of records whether there were discoverable files as to fabrication, and the custodian responded under oath that the officer had "no complaints in the last five years." The court did not review any records or ask any other questions. This procedure was inadequate.

"When a trial court concludes a defendant's *Pitchess* motion shows good cause for discovery of relevant evidence contained in a law enforcement officer's personnel files, the custodian of the records is obligated to bring to the trial court all 'potentially relevant' documents to permit the trial court to examine them for itself. . . . Documents clearly irrelevant to a defendant's *Pitchess* request need not be presented to the trial court for in camera review. But if the custodian has any doubt whether a particular document is relevant, he or she should present it to the trial court. . . . The custodian should be prepared to state in chambers and for the record what other documents (or category of documents) not presented to the court were included in the complete personnel record, and why those were deemed irrelevant or otherwise nonresponsive to the defendant's *Pitchess* motion." (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228–1229.) "[T]he locus of decisionmaking is to be the trial court, not the prosecution or the custodian of records." (*Id*. at p. 1229.)

If the custodian does not bring the entire personnel file or provide information about the records included in the file, the trial court "cannot adequately assess the completeness of the custodian's review of the personnel files, nor can it establish the legitimacy of the custodian's decision to withhold documents contained therein." (*People v. Guevara* (2007) 148 Cal.App.4th 62, 69.) The complete absence of information about the records included in the officer's file makes meaningful appellate review impossible. (*Ibid*.)

Here, the trial court did not follow the proper procedure for *Pitchess* review because it did not question the custodian about the records included in the officer's file, deferred to the custodian's determination that no records were subject to disclosure, and

did not make an adequate record for review on appeal.[9] We, therefore, conditionally reverse the judgment and remand for a new *Pitchess* hearing, at which the court must either personally review the officer's personnel records, or obtain a description of their contents, and make an adequate record for purposes of appeal.

If on remand the court decides "that relevant information exists and should be disclosed," it "'must order disclosure, allow [appellants] an opportunity to demonstrate prejudice, and order a new trial if there is a reasonable probability the outcome would have been different had the information been disclosed.'" (*People v. Gaines* (2009) 46 Cal.4th 172, 181.) If the trial court again "'finds there are no discoverable records, or that there is discoverable information but [appellants] cannot establish that [they were] prejudiced by the denial of discovery, the judgment[s] shall be reinstated as of that date. [Citation.]' [Citation.]" (*People v. Wycoff* (2008) 164 Cal.App.4th 410, 416.)

[9] Citizen complaints older than five years that the trial court finds to be "exculpatory," as defined by *Brady*, *supra*, 373 U.S. 83, may be subject to disclosure, despite the five-year limitation in Evidence Code section 1045, subdivision (b)(1). (*City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 15–16.)

DISPOSITION

The judgments are modified to stay the sentence imposed on count 9 under section 654. As modified, the judgments are conditionally reversed and the matter is remanded to the trial court for a new in camera hearing on appellants' *Pitchess* motions. If the trial court finds there are discoverable records, they shall be produced and the court shall conduct further proceedings as necessary. If the court again finds there are no discoverable records, or finds that appellants cannot establish they were prejudiced by the denial of discovery, the judgments shall be reinstated as of that date.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.